No. 87-642

In The
Supreme Court of the United States
October Term, 1987

JAMES W. LEE, RALPH A. EKLUND
and CORA CARR,

Petitioners,

v.

EKLUTNA, INC., COOK INLET REGION, INC.,
UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONDENT, EKLUTNA, INC.'S BRIEF IN OPPOSITION

DAVID P. WOLF
DIANE SMITH TWETEN
Counsel for Respondent,
Eklutna, Inc.
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

25 pp

QUESTION PRESENTED

Should this court grant certiorari to determine whether the Ninth Circuit Court of Appeals was correct in dismissing claims against Native corporations and the United States based upon the Quiet Title Act's twelve-year statute of limitations?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

STATEMENT OF THE CASE

James Lee, Ralph Eklund, and Warren Carr (Plaintiff Cora Carr's late husband) (hereinafter collectively referred to as "the claimants") each filed a "Notice of Location of Settlement or Occupancy Claim in Alaska" embracing, *inter alia,* the land now in dispute, in 1957. CR[1] 87, 80 and 79 (BLM files). The claimants' entries occurred over thirty years after Power Site Classification ("PSC") 107 withdrew the land they now claim from appropriation under the public land laws for power site purposes, and seven years after PSC 399 withdrew all unsurveyed lands not reserved by PSC 107, lying below the 500 foot contour level along the Eagle River in the same township. *Id.* Although the Federal Power Commission ("FPC") thereafter determined that the value of the land would not be injured or destroyed for purposes of power development by location or entry, *id.,* the disputed land was never opened to homestead entry.

At the time the claimants filed their notices of location, they were notified in writing that "OCCUPANCY OR USE IS AT YOUR OWN RISK UNTIL FURTHER NOTICE FROM THE LAND OFFICE." CR 87, 80 and 79. Shortly thereafter, the claimants were notified that a portion of their claims were withdrawn from settlement or occupancy. *Id.* The FPC explained in 1959 that restoration is a function of the Bureau of Land Management

---

1. "CR" refers to pre-consolidation pleadings in Lee and post-consolidation pleadings in all three cases (District Court No. A79-336); "CR-EK" refers to pre-consolidation pleadings in Eklund (District Court No. A80-301); and "CR-CA" refers to pre-consolidation pleadings in Carr (District Court No. A82-411).

("BLM") and no such restoration had been made. CR 76, Ex. 4. The claimants and other settlers in the area sent a letter to the Secretary of the Interior in 1959 asking for clarification of their situation. CR 108, Ex. K. The Assistant Secretary responded that the BLM did not intend to revoke the power site reserve, and that if it did so, preference would go to other persons or entities. The homestead claimants would be granted no preference rights, and were currently in trespass. CR 108, Ex. L. The claimants' homestead entries were therefore denied by the BLM in 1959. CR 87, 80 and 79.

Lee nevertheless filed a homestead entry final proof covering 160 acres in 1962. CR 87. However, his final proof indicated a deficit in his cultivation requirements. *Id.* Thereafter, Lee and his attorney met with the BLM to attempt a compromise. CR 87; CR 76, Ex. 20. Lee was allowed to "clarify" his final proof testimony at which time he increased the amount of acreage he claimed cultivated. He was required to build a habitable dwelling on the 95 acres located outside the withdrawn area and cultivate acreage in this area. CR 87. His prior residency on lands withdrawn from entry was considered "constructive" for purposes of gaining title to the 95 available acres. CR 76, Ex. 21, 22, 23. Lee accepted the settlement and compromise, and in accordance therewith, submitted proof of construction of a habitable dwelling and cultivation as required. CR 87. Although he was represented by counsel, Lee failed to appeal the BLM's decision not to grant him the withdrawn 65 acres, CR 76, Ex. 21, and in November, 1964, patent was issued to Lee for the 95 available acres. CR 76, Ex. 25. Lee thereafter had no application pending for additional acreage and took

no further action to pursue his original homestead claim. However, in 1967, Lee petitioned the BLM for restoration of the disputed land, which would have opened the land to homestead entry by interested persons. CR 87. However, Lee's petition was rejected in 1968, which decision was affirmed by the national office. Lee failed to make further appeal to the Secretary. *Id.*

Eklund also began residing upon the land after being warned that a portion of the land he sought was not subject to homestead entry. CR 80. In addition, Eklund filed a petition with the FPC seeking restoration from the power site withdrawal, and was informed that such restoration could only be achieved by BLM order and that no preference rights would be acquired if the land were restored. CR-EK 12, Ex. D. After the BLM again advised Eklund of the conflict between his entry and the withdrawal, in 1959 Eklund nevertheless filed his final proof. CR 80. Eklund had conflicts both with the land withdrawal and with other homestead claimants. In order to settle with the government and the other claimants, Eklund agreed to file an amended homestead entry application excluding the withdrawn land and seeking patent to 50 acres of available land. *Id.* Per this agreement, Eklund was also allowed to file for an additional contiguous 40 acre parcel. As with Lee, although the statutory life of Eklund's claim had expired and he was lacking in cultivation outside the withdrawal area, the BLM allowed his cultivation to be considered "constructive." Eklund confirmed the agreement and complied with the requirements. *Id.* Therefore, patent was issued for the 50 acres outside the withdrawal in 1964, and for an additional 40 acres in 1972. *Id.* As with Lee, this ended Eklund's case, he had no application

pending, and took no further action on his original homestead claim. His file was closed. CR-EK 9, Ex. O at 2.

As with Lee and Eklund, Carr failed to appeal the 1959 decision of the BLM that a portion of the lands he claimed were not subject to settlement. CR 79. Carr also failed to comply with improvement and cultivation requirements. During the 1963 inspection period, Carr's clearings were found to be overgrown, only 1.1 cultivated acres were located outside the withdrawal, and the house was not being used. *Id.* In addition, Carr was also in conflict with other homesteaders. *Id.* In 1963, a meeting was held in which Carr, Eklund and other homestead claimants came to an agreement concerning the land each of them was claiming. Carr, Eklund, and the other homestead claimants signed an agreement to amend their homestead applications so as not to conflict with one another or with the power site withdrawal. *Id.* Carr's house was within the withdrawn area, but because the garage was "probably" on the correct parcel, the BLM accommodated Carr and decided to "deem" the garage a "habitable house," and in 1964, Carr was issued patent to 8.75 acres. *Id.* Thereafter, Carr's homestead file too was closed, he had no further application pending, and took no further action on his original claim. CR-CA 6, Ex. N at 2.

Upon the adoption of the Alaska Native Claims Settlement Act ("ANCSA"), the lands were again withdrawn to allow for selection and conveyance to Native corporations in settlement of their aboriginal claims. 43

U.S.C. § 1610(a). Eklutna, Inc. ("Eklutna")[2] selected the disputed lands, the required notice was given by publication, and patent was issued to Eklutna in 1979. CR 87; CR 76, Ex. 34; CR-EK 9, Mothershead Affidavit ¶ 15. Having compromised and settled their claims in 1963-1964, *Lee v. United States,* 629 F.Supp. 721, 724-25 (D. Alaska 1985), and having no applications pending, the homestead claimants were no longer of record at this time.

Fifteen years after accepting the settlement and receiving patent to 95 acres, Lee filed a complaint in federal district court. CR 1. Over 17 years after settling his claim and receiving patent to 50 acres, Eklund filed suit. CR-EK 1. Carr waited until over 19 years after settlement and acceptance of patent to file. CR-CA 1. The three cases were consolidated in 1983, CR 61, and the district court dismissed the claimants' claims against the defendants in 1986. 629 F.Supp. 721. The judgment of the district court was affirmed on appeal. 809 F.2d 1406 (9th Cir. 1987).

REASONS WHY THE PETITION SHOULD BE DENIED

The claimants base their petition for a writ of certiorari on three grounds. First, the claimants allege that the decision of the Ninth Circuit Court of Appeals holding the United States is an indispensable party in this

2. Pursuant to Supreme Court Rule 28.1, the following is the only subsidiary (except wholly owned subsidiaries) or affiliate of Eklutna, Inc.: Eagle River Valley Resort, Inc. Eklutna has no parent company.

action conflicts with decisions of this court and a decision of the First Circuit Court of Appeals. Second, the claimants allege that their ANCSA § 22(b) claims are not governed by the Quiet Title Act's statute of limitations, 28 U.S.C. § 2409a(g), but by 43 U.S.C. § 1632(a). Third, the claimants allege that the statute of limitations should be tolled by alleged government misrepresentations.

Eklutna will show that the decision below is not in conflict with existing law, and that the portion dealing with the issue of indispensable parties is applicable only specifically to lands conveyed to ANCSA recipients by the United States, not to quiet title actions in general.

I. THE UNITED STATES IS AN INDISPENSABLE PARTY IN THIS ACTION

A. Conveyances to Native Corporations From the United States Pursuant to ANCSA are Unique and Require the Presence of the United States as a Party When Attacked

ANCSA was enacted in 1971 as a comprehensive settlement of Native claims based upon aboriginal title. 43 U.S.C. § 1601(a). If Eklutna loses this action on the merits and has to convey the disputed land to the claimants under their constructive trust theory, the United States will have to make up the acreage to Eklutna. 43 U.S.C. § 1621 (j)(2). Whether Eklutna conveys the land directly to the claimants or whether the land goes through the United States to the claimants, the end result is the same—that the United States will still have to convey more federal land to Eklutna. This prejudice to the United States in the event Eklutna loses on the merits (not any trust

status)[3] is a major factor in determining that the United States is an indispensable party. *Nichols v. Rysavy,* 809 F.2d 1317, 1333 (8th Cir.), *cert. denied,* 108 S. Ct. 147 (1987); *Sierra Club v. Leathers,* 754 F.2d 952, 954 (11th Cir. 1985); *Nichols v. Rysavy,* 610 F.Supp. 1245, 1253 (D.C.S.D. 1985), *aff'd,* 809 F.2d 1317 (8th Cir.), *cert. denied,* 108 S.Ct. 147 (1987); *Zapata v. Smith,* 437 F.2d 1024, 1026-27 (5th Cir. 1971); *Johnson v. Chilkat Indian Village,* 457 F.Supp. 384, 387 (D. Alaska 1978).

The result of this suit on the merits will depend entirely upon whether the claimants were entitled to patent from the United States government. *Nichols v. Rysavy,* 809 F.2d at 1333:

> [T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy. If the United States issued the patents legally, then appellants' action is groundless. "In short, the government's liability cannot be tried 'behind its back' ". (citations omitted).

See also American Guaranty Corporation v. Burton, 380 F.2d 789, 791 (1st Cir. 1967):

---

3. Although the claimants contend that the Ninth Circuit's decision implies that ANCSA grants are subject to trust status, the determination that the United States is an indispensable party in this action hardly implies that ANCSA conveyances are subject to any trust status. The decision only provides that closed cases cannot be resurrected under ANCSA to take land away from ANCSA recipients. Whether the United States legally or illegally denied patent to the claimants is the issue on the merits of this action, mandating that the United States be a party to any such action.

> A judgment for appellant would necessarily be based on a holding that the United States had no right in the fund. Thus, the United States is an indispensable party to the action .... Since the United States is not and cannot be joined as a defendant, the action cannot proceed.

The claimants are attempting to narrow the issues into a dispute between only themselves and Eklutna, when this simply cannot be done. *Johnson v. Chilkat Indian Village,* 457 F.Supp. at 387 (Plaintiff sought to narrow the issues to a dispute over the conversion of personal property unrelated to the right of plaintiff to remove works of art from the Indian Village, when in fact, a decision in the Village Council's absence would prejudice its interest in the dispute). *See also Sierra Club v. Leathers,* 754 F.2d at 954 (Where, in effect, plaintiff alleged that South Carolina breached its agreement, and the requested relief would result in a reduction of federal highway funds to South Carolina, the state was an indispensable party to the litigation); *Chicago Teachers Union v. Johnson,* 639 F.2d 353, 358-59 (7th Cir. 1980) (Where federal defendants would ultimately have to process claims, joinder was necessary so plaintiffs could be accorded complete relief and would not be faced with the prospect of relitigating the issue); *Zapata v. Smith,* 437 F.2d at 1026-27 (The government was an indispensable party where there was "an indirect effort to collect a debt allegedly owed by the government in an action to which the government has not consented"). The "United States is the party who issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action." *Nichols,* 610 F.Supp. at 1253.

In addition, under the Quiet Title Act, when a decision is adverse to the United States, "the United States nevertheless may retain such possession or control of the real property . . . upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control." 28 U.S.C. 2409a(b). Thus, the United States, if it loses a case on the merits, has the option of conveying the land to the claimants or paying compensation. *Id.*; *Block v. North Dakota,* 461 U.S. 273, 283, 285 (1983). To allow a constructive trust to be imposed directly against Eklutna prevents the United States from exercising its option. This further prejudice to the United States is even more reason why it is necessary that the United States be a party to this action. *See American Guaranty Corporation v. Burton,* 380 F.2d at 791:

> [T]he United States was an indispensable party since the claim sought relief "which would expend itself upon the United States Treasury" . . . .
>
> . . . .
>
> A second question . . . is whether a judgment for plaintiff would "restrain the Government from acting, or . . . compel it to act." (citations omitted).

Eklutna is an innocent party, having selected available lands in settlement of its aboriginal claims according to the public land records. Any dispute as to whether the claimants should have received patent in the 1950's is between the claimants and the United States.[4] To require

---

4. As the district court determined, the claimants may have a claim for money damages against the United States in the United States Claims Court. *Lee,* 629 F. Supp. at 725, 733-34.

Eklutna to litigate the position of the United States on the merits is unfair to both Eklutna and the United States.

B. Constructive Trust is Not Appropriate in This Action

Citing a string of late 19th and early 20th century cases, the claimants contend that because they are suing under a constructive trust theory, the United States need not be involved in this case. The cases cited by the claimants, however, arise out of a legal environment peculiar to the late 19th century and are not relevant in this action. They all predate the adoption of the Administrative Procedure Act ("APA") (Act of June 11, 1946, 60 Stat. 243), as well as the adoption of 28 U.S.C. §§ 1346(f) and 2409a(g) (Oct. 25, 1972, 86 Stat. 1176). Because these cases predate the adoption of the APA, they are all based upon a principle applicable at that time that claimants could not bring suit so long as the United States held title to the land in issue. *See, e.g., Johnson v. Towsley*, 80 U.S. 72, 87 (1871):

> This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity

> and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another.

See also Bockfinger v. Foster, 190 U.S. 116, 121 (1903) (Because ownership still resided in the United States, the court did not have jurisdiction to hear the dispute).

Therefore, at the time of these cases, those who were in the position of the claimants had no remedy so long as the United States held title to the land. It is understandable that this equitable doctrine permitted the court to take jurisdiction and use its equitable powers to impose a constructive trust in favor of a deserving claimant who had no other remedy until title had passed from the government.

The doctrine the claimants urge is now obsolete. The APA provides adverse claimants to the public lands with the right to immediate appeal of final adverse decisions of administrative agencies, and has done so since 1946, years before the claimants settled on the land at issue and before their entries were formally rejected in 1959. 60 Stat. 243 (1946). The constructive trust doctrine is no longer needed to obviate the harsh results which existed prior to the waiver of sovereign immunity and the establishment of jurisdiction brought into effect by the APA. The claimants should not be allowed to sit on their rights for years without exhausting their administrative remedies or appealing adverse decisions to the courts, and wait for the government to convey the land to an innocent third party for an opportunity to impose a constructive trust in their favor.

Further, the cases cited by the claimants are ones in which the United States suffered no prejudice by the imposition of a constructive trust against the patentee. *See, e.g., Daniels v. Wagner*, 237 U.S. 547 (1915). As discussed above, in this case, the United States will be prejudiced by the requirement that it convey to Eklutna the full amount of any acreage Eklutna is deemed to be holding in trust for the claimants.

II. THE QUIET TITLE ACT BARS THE CLAIMANTS' SUIT

Because the United States is an indispensable party, the Quiet Title Act bars this action. 28 U.S.C. § 2409a(g). The claimants cannot circumvent the Quiet Title Act through the use of 28 U.S.C. § 1632, because the Quiet Title Act is the *exclusive* means of challenging the United States' title to real property. *Block v. North Dakota*, 461 U.S. 273, 286 (1983); *California v. Arizona*, 440 U.S. 59, 61-62 (1979); *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1469 (10th Cir. 1987).

The twelve-year Quiet Title Act statute of limitations begins to run when the claimants "knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). The record reflects that the claimants knew of the claim of the United States at least in 1959 when their claims upon the unavailable lands were formally denied. None of the claimants filed suit before 1979, much more than twelve years after they "knew or should have known of the claim of the United States." The claimants were consistently informed of the claim of the United States until they eventually compromised and settled their claims with the BLM in 1963-64, still outside the limitations period.

Section 22(b) of ANCSA (43 U.S.C. § 1621(b)) only preserved what rights the claimants already had. It did not create any new rights. The claimants are attempting to resurrect claims which died years ago by failure to exhaust administrative remedies, failure to appeal administrative decisions, and failure to bring timely suit under the Quiet Title Act. They cite 43 U.S.C. § 1632(a) to argue that the statute of limitations on their homestead claims does not expire until two years after the decision to convey to Eklutna. However, 43 U.S.C. § 1632 (a) provides that "the party seeking such review shall first exhaust any administrative appeal rights." The claimants failed to do so back in the 1950's and early 1960's. Also, if the claimants are correct, then all applications since Alaska was purchased from Russia, for homestead, trade and manufacturing sites or any other purposes, which were ever denied on all 40 million acres to be conveyed to Native corporations under ANCSA, can be reopened and given a new two-year statute of limitations dating from the time of the decision to convey to a Native corporation. Congress did not intend to re-open all closed homestead files on land patented to Natives under ANCSA and allow an additional two years in which to contest the denial of their homestead claims. ANCSA was a settlement of aboriginal claims, and was intended to create finality to such claims, not to resurrect stale claims and extend or renew the period in which to contest old decisions.

III. THE QUIET TITLE ACT'S TWELVE-YEAR STATUTE OF LIMITATIONS WAS NOT TOLLED BY ALLEGED GOVERNMENT MISREPRESENTATIONS

The government has consistently represented its position vis-a-vis the disputed lands to the claimants—that while subject to power site withdrawals, the land was unavailable for homestead entry. The claimants disagree with the government's position and contend that this somehow excuses them from appealing the BLM's adverse decisions as to their claims. Clearly, this is not a "misrepresentation" which gives the claimants the benefit of the doctrine of equitable tolling against the United States. Furthermore, the claimants maintain their position even in light of the fact that while represented by counsel, they compromised and settled their claims with the BLM in 1963-64.

This court has held that the statute of limitations in quiet title actions is jurisdictional. *United States v. Mottaz*, 106 S.Ct. 2224, 2229 (1986); *Block v. North Dakota*, 461 U.S. 273, 287 (1983). The limitations period is also to be strictly construed. *Block*, 461 U.S. at 287. The government should not be equitably barred from asserting such strict jurisdictional requirements.[5] *McIntyre v. United States*, 789 F.2d 1408, 1411 (9th Cir. 1986); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985). *Compare Bowen v. City of New York*, 106 S. Ct. 2022, 2029-30 (1986)

---

5. The case cited by the claimants for the proposition that their equitable theory "is read into every federal statute of limitation," *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1945), refers to a situation "where a plaintiff has been injured by fraud." There has been no allegation of fraud in the present action.

("Tolling, in the rare case such as this, does not undermine the purpose of the 60-day [non-jurisdictional] limitation period . . ." in a statute which was designed to be "unusually protective" of claimants, and where "Congress has authorized the Secretary to toll the 60-day limit."). It would be absurd to allow equitable tolling when the claimants were represented by legal counsel and refused to appeal adverse decisions, instead compromising their claims with the BLM. Although the claimants allege that "they made diligent inquiry," Petition for Writ of Certiorari at 40, they apparently failed to make such inquiry of their own lawyer, or if they did so, made a decision to settle, rather than appeal, their claims. *See, e.g., United States v. Kubrick,* 444 U.S. 111, 124 (1979) (If a claimant was mistakenly told that he does not have a case, the Court sees "no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed . . .").

———o———

CONCLUSION

For the foregoing reasons, the petitioner's claims that the Ninth Circuit's decision is inconsistent with federal case law are without merit. The decision of the Ninth Circuit is consistent with the principles enunciated in prior decisions of federal courts and with applicable statutory law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID P. WOLF
DIANE SMITH TWETEN

Counsel for Respondent, Eklutna, Inc.
COPELAND, LANDYE, BENNETT AND WOLF
420 L Street, Suite 302
Anchorage, Alaska 99501
(907) 276-5152

APPENDIX A

28 U.S.C. § 1346(f) (1972)

The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

43 U.S.C. § 1610(a) Description of Withdrawn Public Lands; Exceptions; National Wildlife Refuge Lands Exception; Time of Withdrawal

(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or

tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3)(A) If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: *Provided,* That if the Secretary, pursuant to section 1616, and 1621(e) of this title determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge.

(B) The Secretary shall make the withdrawal provided for in subsection (3)(A) hereof on the basis of the best available information within sixty days of December 18, 1971, or as soon thereafter as practicable.

43 U.S.C. § 1621(j)(2) Interim Conveyances and Under Selections

Where lands selected and conveyed, or to be conveyed to a Village Corporation are insufficient to fulfill the

Corporation's entitlement under section 1611(b), 1613(a), 1615(b), or 1615(d) of this title, the Secretary is authorized to withdraw twice the amount of unfulfilled entitlement and provide the Village Corporation ninety days from receipt of notice from the Secretary to select from the lands withdrawn the land it desires to fulfill its entitlement. In making the withdrawal, the Secretary shall first withdraw public lands that were formerly withdrawn for selection by the concerned Village Corporation by or pursuant to section 1610(a)(1), 1610(a)(3), 1615(a), or 1615 (d) of this title. Should such lands no longer be available, the Secretary may withdraw public lands that are vacant, unreserved, and unappropriated, except that the Secretary may withdraw public lands which had been previously withdrawn pursuant to section 1616(d) of this title. Any subsequent selection by the Village Corporation shall be in the manner provided in this chapter for such original selections.

60 Stat. 243 § 10 (1946) Administrative Procedure Act (codified in former 5 U.S.C. § 1009)

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . .

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority. . . .